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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JORGE ALBERT REYES, Defendant and Appellant.	C043355 (Super. Ct. No. 01F03175)

After his motion to suppress evidence was denied, defendant Jorge Albert Reyes pleaded no contest to possession for sale of cocaine (Health & Saf. Code, § 11351; count one), methamphetamine (Health & Saf. Code, § 11378; count two), and ecstasy (Health & Saf. Code, § 11378; count three), and admitted that he was armed with a firearm in the commission of count one (Pen. Code, § 12022, subd. (a)(1)). He was sentenced to state prison for five years, four months.

On appeal, defendant contends the search of his parents' residence cannot be justified on the ground of exigent

circumstance or as a probationary search. We affirm the judgment.

FACTS FROM SUPPRESSION HEARING

Some time prior to April 6, 2001, Adam Reyes, Sr. traveled from his Sacramento home to Mexico. Reyes, Sr. asked his son, codefendant Adam Reyes, Jr., to check on the home and take care of some pets during his absence. Reyes, Jr. lived on Mack Road and previously had lived with Reyes, Sr.

On April 6, 2001, Sacramento Police Officer Matthew Young and four other officers went to the Reyes residence to serve an arrest warrant on Reyes, Jr. for misdemeanor driving on a suspended license. Young knocked on the door. While standing on the doorstep, he smelled burnt marijuana. Randi Zayas and Wendy Harris opened the door. Young had not seen the two women before and did not know their relationship to the house. After the door was opened, Young smelled burnt marijuana originating from the living room area. Young told Zayas and Harris that he was looking for Reyes, Jr. and asked whether he could come inside to talk with them. Harris responded, "Sure," and she and Zayas took two steps back. Young stepped inside the residence and then asked the two women if he could check the home to ascertain whether Reyes, Jr. was there. The two shrugged their shoulders and said, "Sure, go ahead." Young had no specific information that Reyes, Jr. was present, although he had previously contacted Reyes, Jr. at the house, which he knew to be the residence of Reyes, Jr.'s parents.

Defendant, the brother of Reyes, Jr., then appeared from the rear of the house. His eyes were watery and bloodshot. Defendant told Officer Young that he wanted Young to leave the house. Young then ascertained that defendant was on searchable probation.[1] At some point, defendant told Young that he did not live at the residence. However, his Department of Motor Vehicles record listed the residence as his current address.

Another officer notified Officer Young that a window at the rear of the house was open, and that someone may have left the house through the window. Young left the residence and drove around the neighborhood in a patrol car, looking for suspects on foot. He observed a male Hispanic in black clothing running back toward the Reyes residence. Young notified officers at the house that a suspect had been seen running back toward that location. A few minutes later, the officers at the house notified Young that Reyes, Jr. had been taken into custody.

Officer Ayaz interviewed Zayas. Zayas told Ayaz that, before she opened the door, she, defendant, Harris and Reyes, Jr. were all in the living room. Defendant and Reyes, Jr.

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[1] We granted the People's motion to augment the record to include the probation order in case No. 97F10546.

Defendant was ordered to "[o]bey all laws," and to "submit his person, property and automobile and any object under defendant's control to search and seizure in or out of the presence of the defendant, by any law enforcement officer and/or Probation officer, at any time of the day or night, with or without his consent, with or without a warrant. Defendant being advised of his constitutional rights in this regard, and having accepted probation, is deemed to have waived same."

walked toward the back bedrooms, telling Zayas that she should "open the door to see what the police wanted."

Officers searched the residence and recovered marijuana, ecstasy, cocaine and $15,000 cash. Officers also recovered body armor, a loaded handgun and various indicia for both defendant and Reyes, Jr.

Zayas testified that she visited Reyes, Jr. on April 6, 2001. At around 7:00 p.m., she saw marked patrol cars pull up to the house. Officers entered the house without knocking, stating that they had smelled something. The officers asked for Reyes, Jr. Zayas said she did not know where he was.

Harris testified that the officers were outside when defendant told them that Reyes, Jr. was not in the residence. When the officers asked if they could come in, defendant responded that the house was "not their residence" but was "their parents' residence."

At the conclusion of the evidence, the trial court made oral findings that there was a valid arrest warrant for Reyes, Jr. and that the officers could reasonably believe that he lived at Reyes, Sr.'s residence or was a frequent visitor. The court found that Officer Young was given consent to enter, and expressly rejected Harris's and Zayas's contrary testimony.

The trial court orally granted defendant's request to join Reyes, Jr.'s suppression motion. Following arguments of counsel, the court took the matter under submission.

The trial court issued a written order upholding the warrantless search on the grounds (1) the smell of burnt

marijuana emanating from the residence was an exigent circumstance that allowed the officers to enter, and (2) once the officers entered and learned that defendant was on searchable probation, the probation condition justified the ensuing search.

DISCUSSION

I

Defendant contends, and the People concede, the smell of burnt marijuana did not constitute an exigent circumstance. We accept the People's concession.

"'"An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent

review."' [Citation.]" (*People v. Ayala* (2000) 24 Cal.4th 243, 279.)

"Because a warrantless entry is presumptively unreasonable within the meaning of the Fourth Amendment [citations], the People bear the burden of establishing that exigent circumstances or another exception to the warrant requirement justified the entry. [Citation.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 575, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see *People v. Smith* (2002) 95 Cal.App.4th 283, 300.)

In California, use and possession of a small amount of marijuana is no longer a serious offense. Possession of not more than 28.5 grams of marijuana is punishable by a fine of $100 (Health & Saf. Code, § 11360, subd. (b)); nonviolent drug possession is no longer punishable by jail except in limited circumstances (Pen. Code, § 1210.1, subd. (a) [Prop. 36]); and seriously ill Californians may use marijuana for medical purposes (Health & Saf. Code, § 11362.5 [Prop. 215]).

The trial court correctly noted that, when the amount is greater than 28.5 grams, the "administer[ing]," "furnish[ing]" or "giv[ing] away" of marijuana is still a felony. (Health & Saf. Code, § 11360, subd. (a).) However, nothing in the record allowed the officers to infer that more than 28.5 grams were present at the Reyes residence.

The trial court effectively conceded as much when it wrote, "Smelling burnt marijuana could reasonably indicate to an officer that there *may be* an amount greater than 28.5 grams

inside the residence . . . ." (Italics added.) Without further facts, such as the minimum amount needed to produce a discernable odor, an officer who believed the requisite quantity "may be" present could *only speculate* as to whether it *was in fact* present.

The lack of an exigent circumstance does not entitle defendant to reversal of the judgment. "'"'[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" [Citation.]' [Citation.]" (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1162.) As we next explain, the warrantless entry was justified by consent.

The trial court made a factual determination that the officers were "given consent to enter." (See *People v. Williams* (1999) 20 Cal.4th 119, 136 [scope of issues on review is limited to those raised during argument].) Then the court made a legal determination that the women had neither apparent nor actual authority to give consent. We conclude the women had both apparent and actual authority.

Consent is not valid unless "'the facts available to the officer at the moment'" would "'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 188 [111 L.Ed.2d 148, 161], quoting *Terry v. Ohio* (1968) 392

U.S. 1, 21-22 [20 L.Ed.2d 889, 906]; see *People v. Hoxter* (1999) 75 Cal.App.4th 406, 413.)

"It has been said that the fact that a person answers the door is a demonstration of apparent authority. [Citation.]" (*People v. Superior Court* (*Fall*) (1973) 31 Cal.App.3d 788, 800.) Because it is the observed *act* of opening the door that creates the appearance of authority, the lack of additional facts *further* suggesting a relationship between the actor and the property is not determinative. No "facts available to" Officer Young "at the moment" the door opened (*Illinois v. Rodriguez, supra*, 497 U.S. at p. 188) suggested authority *was lacking, even though the door was opened,* because, e.g., Harris or Zayas was a minor (see *People v. Jacobs* (1987) 43 Cal.3d 472, 483), a motel clerk or maid (see *Illinois v. Rodriguez, supra*, at p. 187), or the landlord of Reyes, Sr. (see *Chapman v. United States* (1961) 365 U.S. 610, 617 [5 L.Ed.2d 828, 833]).

Not only was the entry justified by apparent authority, it was also supported by actual authority. (*Illinois v. Rodriguez, supra*, 497 U.S. at p. 189.)

Officer Ayaz and Zayas both testified as to whether Zayas had been instructed to open the door. The prosecutor asked her, "Did you tell Officer Ayaz that 'Jorge and Adam told us,' you and Wendy [Harris], 'to open the door to see what you guys wanted'?" Zayas replied, "No."

The prosecutor later asked Officer Ayaz essentially the same question. Ayaz referred to his report "to make sure exactly what was said," and then testified, "Zayas told me that

[defendant] and [Reyes, Jr.] . . . told Zayas to open the door to see *what the police wanted*." (Italics added.)

The trial court stated it "believe[d Officer Ayaz's] version." However, the court's recollection of Ayaz's words was flawed: it found that Zayas had been instructed "to go open the door and *see who's there*," *not* to see "what the police wanted." (Italics added.) Thus, the court concluded Zayas was given authority only "to open the door and not necessarily to [allow the officers to] enter."

On this record, the difference in wording is crucial. Zayas could "see who's there" simply by opening the door and looking. However, merely looking would not tell her "what the police wanted." When Zayas opened the door, Officer Young told her that he was looking for Reyes, Jr. for a reason he did not disclose. Immediately thereafter, Young asked Zayas for permission to enter and speak to her. Zayas could reasonably deduce that Young would not explain further what he wanted until she allowed him to enter. The instruction to find out "what the police wanted" implied authority to admit Young and speak to him for the purpose of finding out "what the police wanted" with Reyes, Jr. without requiring Reyes, Jr. to reveal his presence to the officers. An instruction merely to see "who's there" would have implied no such authority.

Because Zayas had both apparent and actual authority to admit Officer Young, the warrantless entry into the residence was lawful. (*Illinois v. Rodriguez, supra*, 497 U.S. at p. 189.)

II

Our conclusion that the entry was lawful (part I, *ante*) disposes of defendant's contention that the discovery of his probation status and the ensuing probation search are tainted fruits of an unlawful entry.

Because the officers were lawfully in the residence when they smelled burnt marijuana and saw defendant displaying symptoms of being under its influence, they had reasonable suspicion that a crime was being committed and could lawfully remain for a reasonable time while they investigated the crime. (*People v. Bennett* (1998) 17 Cal.4th 373, 387; *People v. Souza* (1994) 9 Cal.4th 224, 230.) This is so notwithstanding defendant's protestations that he wanted the officers to leave.

Defendant concedes that the officers discovered his probation status *before* they searched the premises. (Contrast *People v. Sanders* (2003) 31 Cal.4th 318, 335 [parole status discovered *after* unlawful protective sweep]; *People v. Robles* (2000) 23 Cal.4th 789, 793 [probation status discovered after evidence obtained].) Because the probation condition required defendant to obey all laws (see fn. 1, *ante*), and the officers observed symptoms of intoxication that suggested he had not done so, there was a direct relationship between the probation condition and the search. The suppression motion was properly denied.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.